SYARIKAT KEMAJUAN PERUMAHAN NEGARA SDN BHD

v.

LEE CHENG & ANOR

COURT OF APPEAL, PUTRAJAYA
ABDUL MALEK AHMAD PCA
TENGKU BAHARUDIN SHAH JCA
JAMES FOONG JCA
[CIVIL APPEAL NO: C-04-28-1999]
8 SEPTEMBER 2005

CONTRACT: *Building contract - Delivery of vacant possession - Whether developer obliged to energize supply of water and electricity into building before handing over vacant possession of building - Housing Developers (Control and Licensing) Regulations 1989*

CONTRACT: *Housing development - Sale and purchase agreement - Sale and purchase agreement subject to the Housing Developers (Control and Licensing) Regulations 1989 - Vacant possession - Whether vacant possession under the Housing Developers (Control and Licensing) Regulations 1989 presupposes the developer's responsibility to energize the supply of water and electricity into the building*

The respondents bought a shop-house from the appellant developer. A sale and purchase agreement ('the agreement') dated 16 May 1990 was executed. The agreement was in compliance with the Housing Developers (Control and Licensing) Regulations 1989. Pursuant to the agreement, the last date for the appellant to deliver vacant possession was on 16 May 1992. Water pipes and electricity mains were duly laid and connected to the shop-house on 13 January 1991. Keys to the shop-house were handed over to the respondent on 30 October 1991. The Certificate of Fitness was issued on 19 August 1993. However, electricity supply was only connected to the shop-house on 18 January 1994. The respondents thus claimed from the appellant damages for late delivery of vacant possession from 16 May 1992 to 18 January 1994. The claim was first allowed in the magistrates' court. The appellant appealed to the High Court which dismissed its appeal. The appellant thus appealed to the Court of Appeal. In the Court of Appeal, the appellant's counsel relying on r. 12(1)(l) of the Housing Developers (Control and Licensing) Rules 1970 ('the 1970 Rules') submitted *inter alia* that the appellant was only obliged to connect

the electricity and water mains to the internal mains of the shop-house. The flow of water and electricity was not the appellant's responsibility, argued counsel. The respondents' counsel however contended that the 1970 Rules had been repealed and the regulations applicable in the instant case were the Housing Developers (Control and Licensing) Regulations 1989 ('the 1989 Regulations'). The 1989 Regulations, said respondents' counsel, obliged a housing developer to energize water and electricity flow into a building when handing over vacant possession. Thus, the appellant was required to connect the electricity supply to the respondents' shop-house before handing over vacant possession, submitted counsel.

Held

Per James Foong J (dismissing the appeal with costs):

[1] The principles and propositions enunciated in cases associated with late delivery of vacant possession must be considered in the light of the rules and regulations specifically applicable to those cases. The principles and propositions cannot be of universal guide for all cases associated with the late delivery of vacant possession. (p 146 d-f)

[2] Pursuant to the 1989 Regulations, vacant possession with connection of water and electricity to a building must include the developer's duty to energize the water and electricity flow into the building. It is not sufficient for the developer to just lay the pipes and cables for electricity and water to connect the said building to the sub-station or water mains. The developer must ensure at the time of delivery of vacant possession of the said building that there is supply of water and electricity ready for tapping into the building. *Hoya Holding Sdn Bhd v. Chia Thin Hing & Anor* [1994] 4 CLJ 992 (folld); *Lew Yoke Leng & Ors v. Syarikat Kar King Sdn Bhd* [2000] 4 CLJ 184 (folld). (p 146 g-h)

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden telah membeli sebuah rumah-kedai dari perayu, seorang pemaju. Suatu perjanjian jual beli ('perjanjian itu') bertarikh 16 Mei 1990 telah ditandatangani. Perjanjian itu menurut peruntukan Kaedah Pemaju Perumahan (Kawalan dan Perlesenan) 1989. Di bawah perjanjian itu, tarikh akhir bagi perayu memberikan milikan kosong adalah pada 16 Mei 1992. Paip air dan meter letrik telah diletak dan dipasang pada rumah kedai itu pada 13 Januari 1991. Kunci kepada rumah kedai itu telah diserahkan kepada responden pada 30 Oktober 1991. Sijil Kelayakan Menduduki telah dikeluarkan pada 19 Ogos 1993. Walaubagaimana pun, bekalan letrik hanya dipasang kepada rumah kedai

itu pada 18 Januari 1994. Maka responden telah menuntut dari perayu ganti rugi bagi kelewatan penyerahan milikan kosong dari 16 Mei 1992 sehingga 18 Januari 1994. Tuntutan itu telah dibenarkan di Mahkamah Majistret. Perayu telah merayu kepada Mahkamah Tinggi yang telah menolak rayuannya. Maka perayu telah merayu kepada Mahkamah Rayuan. Di Mahkamah Rayuan, peguam perayu merujuk kepada k. 12(1)(l) Kaedah Pemaju Perumahan (Kawalan dan Perlesenan) 1970 ('Kaedah 1970 itu') berhujah, antara lain, bahawa perayu hanya perlu menyambung meter elektrik dan air kepada bahagian dalaman rumah kedai itu. Aliran air dan elektrik bukannya tanggungjawab perayu, hujah beliau. Peguam responden sebaliknya mendakwa Kaedah 1970 itu telah dimansuhkan dan kaedah yang terpakai dalam kes ini adalah Kaedah Pemaju Perumahan (Kawalan dan Perlesenan) 1989 ('Kaedah 1989 itu'). Kaedah 1989 itu, kata peguam responden, memerlukan seseorang pemaju perumahan memulakan aliran air dan elektrik kepada sesuatu bangunan apabila menyerahkan milikan kosong. Maka, perayu dikehendaki menyambung bekalan leterik kepada rumah kedai responden sebelum menyerahkan milikan kosong, hujah peguam.

Diputuskan
Oleh James Foong H (menolak rayuan itu dengan kos:)

[1] Prinsip dan proposisi yang dilafazkan dalam kes-kes yang berkaitan dengan kelewatan penyerahan milikan kosong perlu dilihat dari aspek kaedah dan peruntukan yang khas berapplikasi kepada kes-kes itu. Prinsip dan proposisi itu tidak boleh digunapakai sebagai panduan am bagi setiap kes yang berkaitan dengan setiap kes kelewatan penyerahan milikan kosong.

[2] Di bawah Kaedah 1989 itu, milikan kosong dengan penyambungan air dan letrik kepada sesebuah bangunan meliputi tanggungjawab pemaju memulakan aliran air dan elektrik kepada bangunan itu. Sekadar meletakkan paip dan kabel bagi menyambungkan bangunan itu kepada pencawangan tidak mencukupi. Pemaju harus memastikan bahawa semasa penyerahan milikan kosong bangunan itu terdapat bekalan air dan letrik dapat digunkan pada bangunan itu. *Hoya Holding Sdn Bhd lwn. Chia Thin Hing & Anor* [1994] 4 CLJ 992 (diikuti); *Lew Yoke Leng & Ors lwn. Syarikat Kar King Sdn Bhd* [2000] 4 CLJ 184 (diikuti).

a **Case(s) referred to:**
Charles Muriel v. Newacres Sdn Bhd [1994] 2 AMR 23 ***(refd)***
Hoya Holding Sdn Bhd v. Chia Thin Hing & Anor [1994] 4 CLJ 992 HC ***(foll)***
Kandasamy Sreenivasagam v. Syarikat Muzwina Development Sdn Bhd [1990] 1 MLJ 15 ***(refd)***
Lew Yoke Leng & Ors v. Syarikat Kar King Sdn Bhd [2000] 4 CLJ 184 HC ***(foll)***
b *Salmah Sulaiman & Anor v. Metroplex Development Sdn Bhd [1997] 2 CLJ 148 CA* ***(refd)***
Syarikat Lean Hup (Liew Brothers) Sdn Bhd v. Cheow Chong Thai [1988] 3 MLJ 221 ***(refd)***
Tay Ket v. Bumibakti Development Sdn Bhd [1994] 2 AMR 35 ***(refd)***

c **Legislation referred to:**
Housing Developers (Control and Licensing) Rules 1970, r. 12(1)(l)

For the appellant - Felix Dorairaj; M/s Dorairaj, Low & Teh
For the respondent - KC Cheah; M/s KC Cheah & Co

d *[Appeal from High Court, Raub; Summons No: 72-18-1995]*

Reported by Andrew Christopher Simon

JUDGMENT

e **James Foong JCA:**

Introduction

This appeal centres on the perennial dispute as to whether delivery of vacant possession of a house sold by a developer to a purchaser should include supply of water and electricity to the house and if so to what extent and manner.

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Facts

The undisputed facts of this case are these:

> By a sale and purchase agreement dated 16.5.1990 (S & P Agreement), the respondent purchased from the appellant a shop house in Raub for a sum of
g RM95,000.00. Complying with regulation 11(1) of the Housing Developers (Control And Licensing) Regulations 1989 (1989 Regulations), the S & P Agreement contains the following clauses, relevant to the dispute in this case:

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Clause 17(1)

The Vendor shall, at its own cost and expense, lay or cause to be laid all necessary water, electricity and sewerage mains, gas piping (if any) and internal telephone trunking and cabling (if any), to serve the said Estate and at its own cost and expense undertake to apply for the connection of internal water, electricity, sanitary and gas installations (if any) of the said Building to the water, electricity and sewerage mains of the Appropriate Authority, and the gas mains of the relevant authority.

Clause 17 (2)

The Purchaser shall be liable for and shall pay, within fourteen (14) days after the receipt of a notice requesting for payment from the Vendor, the deposits for the installation of water, electricity and gas meters and the Vendor shall bear all other costs, if any.

Clause 20(1)

The said Building shall be completed by the Vendor and vacant possession with the connection of water and electricity supply to the said Building, shall be handed over to the Purchaser within twenty-four (24) calendar months from the date of this Agreement.

Clause 20(2)

If the Vendor fails to hand over vacant possession of the said Building together with the connection of water and electricity supply to the said Building in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

Clause 21(1)

Upon the issue by the Vendor's Architect of a Certificate certifying that the construction of the said Building has been duly completed and water and electricity supply has been connected to said Building and the Purchaser having paid all monies payable under clause 4(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement the Vendor shall let the Purchaser into possession of the said Property.

The last date for the appellant to deliver vacant possession of the said building under the S & P Agreement is 16 May 1992. Water pipes and electricity mains were duly laid and connected to the said building on 13 January 1991. Keys to the said building were handed over to the respondent on 30 October 1991. Certificate of Fitness to the said building was issued on 19 August 1993. However, electricity supply was only connected to the said building on 18 January 1994.

For this, the respondent claimed from the appellant in the Magistrate's Court in Raub a sum of RM15.902.73 for late delivery of vacant possession of the said building from 16 May 1992 to 18 January 1994; a total of 611 days.

The learned Magistrate allowed the respondent's claim with interest and costs. Dissatisfied, the appellant appealed to the High Court in Raub. Judicial Commissioner Dato' Azhar Ma'ah (as he then was) dismissed the appeal with costs. Still discontented, the appellant filed this appeal before us.

Appellant's Argument

Mr. Felix Dorairaj, counsel for the appellant, first submitted that the appellant has complied with its obligation to the respondent to hand over vacant possession of the said building to the respondent on time. At that time, the appellant had, at its own cost and expense, laid all the pipes and cables for connection of water and electricity to the said building as well as having applied to the appropriate authorities for such connection in accordance with cl. 17(1) of the S & P Agreement. He then stressed that the appellant is not responsible to energize the water and electricity flow into the building. To support this, he relied on r. 12(1)(l) of the Housing Developers (Control and Licensing) Rules 1970 (1970 Rules) that requires the developer "shall at his own costs and expenses cause the connection of electricity, water and sewerage mains of the Appropriate Authority or public authority with the internal electricity, water and sewerage mains of the housing accommodation erected for the purchaser". To top this, he cited this court's decision in *Salmah binti Sulaiman & Anor v. Metroplex Development Sdn Bhd* [1997] 2 CLJ 148 where, this court has declared:

> We agree with Siti Norma Yaakob J that the Rule speaks of connection of the electrical and water mains and that the respondent's obligation was only to connect electricity and water mains to the internal electricity and water mains and not the flow of water and electricity.

In short, what the appellant is maintaining is that the developer is only obliged "to connect the electricity and water mains to the internal mains of the said building; the flow of water and electricity is the responsibility of the relevant authorities".

Respondent's Contention

Mr. K.C. Cheah, counsel for the respondent, was swift to identify the fallacy of the appellant's argument that relied on an out-dated rule or regulation. He enlightened this court that the 1970 Rules has been repealed. And subsequent to this, there has been four amendments to the Housing Developers (Control and Licensing) Rules, the latest is the Housing Developers (Control and Licensing) (Amendment) Regulations 2002. But since this case evolved between the period of 1990 (the date of the S & P Agreement) and 1992 (the date when vacant possession was supposed to be delivered) the Housing Developers (Control and Licensing) Regulations 1989 (1989 Regulations) should be applicable. In fact, the entire terms and conditions in the S & P Agreement are *pari materia* to the mandatory formatted sale and purchase agreement set out in Schedule G of the 1989 Regulations where all developers had to adopt when selling their developed properties. Under cls. 20(1), 20(2) and 21(1) of the S & P Agreement, as spelt out in the earlier part of this judgment, the appellant when delivering vacant possession must have water and electricity supply connected to the said building. This means that the appellant, as developer, must energize the water and electricity flow into the said building. To support this contention, Mr. Cheah cited a number of High Court authorities which I shall dwell into in the latter part of this judgment.

Analysis

With such disclosure, at the outset, it is clear that the appellant has relied on an out dated 1970 Rules where r. 12(1)(l) therein merely states:

> provisions binding on the licensed housing developer that he shall at his own costs and expenses cause the connection of electricity, water and sewerage mains of the Appropriate Authority or public authority with the internal electricity, water and sewerage mains of the housing accommodation erected for the purchaser.

After the 1970 Rules were repealed, the Housing Developers (Control And Licensing) Regulations 1982 (1982 Regulations) came into force. The 1982 Regulations requires every sale and purchase agreement for houses constructed and sold within the definition of the said Act to comply with the prescribed formatted sale and purchase agreement set out in Schedule E thereof. And cl. 15(1) of the prescribed agreement states:

> The Vendor shall at its own cost and expense cause to be laid all necessary water, electricity and sewerage mains to serve the said Building and undertakes to apply for at its own cost and expense the connection of the internal water, electricity and sanitary installations of the said Building to the water, electricity and sewerage mains of the Appropriate Authority.

Then cl. 18(1) spells out:

> The said Building shall be completed by the Vendor and vacant possession delivered to the Purchaser within twenty-four (24) calendar months from the date of this Agreement.

In April 1989, the 1982 Regulations were replaced by the 1989 Regulations. Clause 20(1) in the formatted sale and purchase agreement listed under Schedule G of the 1989 Regulation demands:

> The said Building shall be competed by the Vendor and vacant possession, with the connection of water and electricity supply to the said Building, shall be handed over to the Purchaser within twenty four (24) calendar months from the date of this Agreement.

Then cl. 20(2) states that:

> If the Vendor fails to hand over vacant possession of the said Building, together with the connection of water and electricity supply to the said Building, in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

From the above, one can observe that the phraseology with regard to water and electricity supply is tied-up with vacant possession and the demand for such amenities to be supplied and connected to the building constructed has changed since the 1970 Rules and the 1982 Regulations. The 1989 Regulations requires the developer to complete and hand over vacant possession of the building within a specific time "with the connection of water and electricity supply to the said Building". As a result of this, a number of High Court authorities have interpreted this provision in the 1989 Regulations to mean that "there must be water and electricity supplies actually running through the internal water pipes, electric lines and power lines in the dwelling house before the question of whether or not vacant possession has been delivered could even be considered" – Abdul Malik Hj. Ishak J in *Hoya Holding Sdn Bhd v. Chia Thin Hing & Anor* [1994] 4 CLJ 992.

In another case, *Lew Yoke Leng & 2 Ors v. Syarikat Kar King Sdn Bhd* [2000] 4 CLJ 184, decided by me as judge of first instance, I have also interpreted cl. 20(1) and (2) of the formatted sale and purchase agreement under Schedule G of the 1989 Regulations to say that "water and electricity must be connected to the house before it is considered to be completed with vacant possession for the purpose of calculating time to hand over the property to the plaintiffs". I then went on to add that "Simply put: it means when the plaintiffs entered the house upon delivery of vacant possession and turned on the lights it will be illuminated when he affixes a bulb to it. I cannot comprehend it to mean electricity supply only to a sub-station in the housing estate where the house is erected, be that becomes near or far".

Admittedly, there are cases that were decided otherwise. In *Tay Ket @ Chan Kong Seong v. Bumibakti Development Sdn Bhd* [1994] 2 AMR 35:1832, Wan Adnan Ismail J expressed the following views:

> As at February 18, 1987, the defendants had already caused electricity to be connected to the sub-station. As the developer, the defendants had to build the sub-station for the supply of electricity to all the houses in the project. The sub-station had been energized. What was left to be done was for meters to be installed at the houses within the project. This the defendants could not do even if they wanted to ... Only LLN can install the meters and connect the electricity to the houses.

But it must be noted that this case was decided based on the 1982 Regulations where the words: "with connection of water and electricity supply to the said Building" are absent. This is evidenced from the statement by the learned judge who said at p. 1836: "Therefore item 3 of the Third Schedule of the Housing Developers (Control and Licensing) Regulations 1982 was complied with as soon as the defendant has energized the sub-station to enable electricity to be connected to all the houses in the project". Thus, it is my view that this case was not decided on the same set of laws applicable to the present case.

This similar approach is shown in *Salmah binti Suleiman & Anor v. Metroplex Development Sdn Bhd (supra),* a decision of this court. Zakaria Yatim JCA, delivering the judgment of this court then, declared that he had "to examine the relevant provision of the law ... Rule 12(1)(l) of the Housing Developers (Control and Licensing) Rules 1970" in deciding on the case. But as disclosed, the 1970 Rules, similar to the 1982 Regulations, does not contain the words "with connection of water and electricity supply to the said Building" that is evident in the 1989 Regulations.

But even before the coming into force of the 1989 Regulations, there is already a line of authorities that differs from the approach of two cases mentioned above. In *Syarikat Lean Hup (Liew Brothers) Sdn Bhd v. Cheow Chong Thai* [1988] 3 MLJ 221, Mustapha Hussain J had even decided that under the 1982 Regulations, vacant possession has to include the connection of water and electricity to the said house. The Supreme Court affirmed this decision in 1989.

Then in *Kandasamy a/l Sreenivasagam v. Syarikat Muzwina Development Sdn Bhd* [1990] 1 MLJ 15 Abdul Malek J (as he then was) followed and adopted the approach of *Syarikat Lean Hup (Liew Brothers) Sdn Bhd v. Cheow Chong Thai (supra)*. Again, this was repeated in *Charles Muriel (f) v. Newacres Sdn Bhd* [1994] 2 AMR 23:1145, a decision of Abu Mansor J (as he then was).

From the line of authorities cited, most cases were decided in accordance with the respective rules and regulations applicable to the facts of each case. Thus whatever principles and propositions enunciated in these cases must be considered in the light of those rules and regulations that were applicable. They cannot be of universal guide for all cases associated with late delivery of vacant possession of houses classified under the Housing Developers (Control and Licensing) Act except when the appropriate rules and regulations so applied are similar. Thus, one must be cautious when relying on such authorities to support or argue against the scope and extent of water and electricity to be supplied to the constructed building under the said Act. Here, what sauce is good for the goose is not necessarily good for the gander. The respective rules or regulations used in each case must be fully appreciated. In our instant case, there is no doubt that the 1989 Regulations are applicable. With the phase "vacant possession of the said Building together with the connection of water and electricity supply to the said Building" expressly and unambiguously stated in mandatory statutory provision of cls. 20(1) and (2) of the formatted agreement set out in Schedule E in the 1989 Regulations and repeated in identical fashion by cl. 20(1) and (2) in the S & P Agreement, I am convinced that all those statements expressed by Abdul Malik Hj. Ishak J in *Hoya Holding Sdn Bhd v. Chia Thin Hing @ Cheah Thin Heng & Anor (supra)* and me in *Lew Yoke Leng & 2 Ors v. Syarikat Kar King Sdn Bhd (supra)* is the correct state of the law relating to the meaning of this term in respect of the 1989 Regulations. To add, I would say that vacant possession with connection of water and electricity to the said building must include the developer's duty to energize the water and electricity flow into the building. It is not sufficient for the developer to just lay the pipes and cables for

electricity and water to connect the said building to the sub-station or water mains. The developer must ensure, at the time of delivery of vacant possession of the said building, that there is supply of water and electricity ready for tapping into the building.

Conclusion

On these considerations, I am of the view that this appeal should be dismissed with costs.

My two brother judges have concurred with the grounds as stated above.